IN THE

Supreme Court of the United States

October Term 1941

No. .....

LOIS G. LARSON, also known as L. G. LARSON, doing business as L. G. LARSON DRILLING COMPANY,

Appellant (Petitioner),

vs.

JACK LANE, Trustee in Bankruptcy of the ESTATE OF LOIS G. LARSON, etc., Bankrupt; SERVICE OILFIELD SUPPLY CO., INC.; ROTARY DRILLING AND RENTAL CORPORATION, and H. C. SMITH OIL TOOL COMPANY,

Appellees (Respondents).

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on December 1, 1941.

The statute under which jurisdiction is invoked is section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. 347).

Petitioner urges that the Circuit Court of Appeals for the Ninth Circuit has decided an important question of federal law which has not, but should be settled by this Court, and has decided an important question of general law probably untenable and in conflict with the weight of

authority; that this Honorable Court has jurisdiction of the matter by virtue of the above cited statute as interpreted by Rule 38, subsection 5(b), Revised Rules of the Supreme Court of the United States now in effect.

Opinions and Decree Below.

The decision of the District Court, as shown by the Report of the Special Master, which it confirmed over the objections filed by appellant, is found in petitioner's transcript, pages 16-23.

The opinion of the Circuit Court of Appeals for the Ninth Circuit rendered and filed on the 1st day of December, 1941. The decree of the United States Circuit Court of Appeals was filed and entered on the 1st day of December, 1941.

Statement of Facts.

The essential facts of the case are fully set forth in the accompanying petition for writ of certiorari and in the interest of brevity are not repeated here.

Specifications of Error.

1. The Circuit Court of Appeals for the Ninth Circuit erred in deciding that there was no lack of jurisdiction of the District Court, regardless of the fact that the parties signing the involuntary petition did not meet the requirement of section 59-b of the Bankruptcy Statute.

2. The Circuit Court of Appeals for the Ninth Circuit erred in not declaring the adjudication void because the

involuntary petition showed the alleged bankrupt to be a married woman and that no debt, liability, or agreement to be bound was alleged.

3. The Circuit Court of Appeals for the Ninth Circuit erred in deciding that the truth or falsity of the allegations of an involuntary petition for bankruptcy could not be inquired into and erred in not vacating the adjudication and dismissing the involuntary petition for the extrinsic fraud upon the court.

4. The Circuit Court of Appeals for the Ninth Circuit erred in deciding that there was no lack of jurisdiction of the District Court, even though this petitioner was never served with a copy of the involuntary petition for bankruptcy and subpoena, and in not deciding that the duress, pressure, and threats or requests to obtain a consent to an adjudication by the attorney for the respondents, constituted extrinsic fraud.

ARGUMENT.

POINT I.

The Circuit Court of Appeals for the Ninth Circuit Erred in Deciding That There Was No Lack of Jurisdiction of District Court, Regardless of the Fact That the Parties Signing the Involuntary Petition Did Not Meet the Requirement of Section 59-b of the Bankruptcy Statute.

A. THE JURISDICTION OF A COURT OF LIMITED POWERS DEPENDS ON THE NATURE OF THE PARTIES ALLOWED TO BRING THE ACTION.

This petitioner is attacking the adjudication against her by her petition to set aside the same both upon the grounds of (1) lack of jurisdiction of the bankruptcy court, and (2) for extrinsic fraud.

In this constitutional form of government of the United States, there are three departments: the legislative, the executive, and the judicial. The judicial department is given its right to act in a particular controversy by the Acts of Congress, the legislative body. Therefore, unless the power, right, or authority of the Court to perform a contemplated act or assume jurisdiction of a case brought before the Court by a complaining petition, can be found or expressly stated and given to such complaining petitioner in the Constitution or the laws enacted by Congress. thereunder, the Court is without jurisdiction and its acts are without validity.

This petitioner alleged in her petition to set aside the adjudication and dismiss the involuntary petition against her, that:

> "Said involuntary petition was in fact not signed by three creditors of this petitioner, nor was the same sufficient to confer jurisdiction upon this court to adjudicate this petitioner a bankrupt, nor were the persons, firms, or corporations signing the same qualified creditors of this petitioner at the time of filing thereof."

This petitioner went further to state the substance pertinent part of the joint adventure agreement with the Rotary Drilling and Rental Corporation and the H. C. Smith Oil Tool Company, in that each were to be paid from the proceeds of the production of oil from the oil well to which each were to aid in drilling. That the consideration was to be several times the regular price usually made by firms. That this petitioner never ordered or purchased from the Service Oilfield Supply Co., Inc., any material or equipment of any kind or character or promised to pay them anything.

At the hearing before the Special Master the evidence of the joint adventure contract was admitted. Likewise the evidence that there was no contract, oral or written, with the Service Oilfield Supply Co., Inc. By this evidence, the allegation of the involuntary petition for bankruptcy that the respondent corporations herein were creditors of alleged bankrupt having provable claims amounting in the aggregate in excess of the securities held by them to the sum of five hundred ($500.00) dollars, was false.

The allegation of a provable claim is necessary for jurisdiction of the District Court. It was error to rule that the falsity of the allegation did not show a lack of jurisdiction.

The allegation of the respondent corporations that they were *bona fide* creditors of this petitioner were false and made only for the purpose of inducing the District Court, acting as a court of bankruptcy, to assume jurisdiction where none otherwise existed.

The District Court, acting as a court of bankruptcy, derives its jurisdiction from the Bankruptcy Statute. And those persons, firms or corporations who desire to invoke the jurisdiction of the bankruptcy court must be those that are given such right by the law. Section 59-b of the Bankruptcy Statute, chapter VI, specifically states who may invoke the jurisdiction of the bankruptcy court over another.

> "Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; . . . may file a petition to have him adjudged a bankrupt."
>
> "The definition of a creditor . . . shall include anyone who owns a demand or claim provable in bankruptcy."
>
> *In re Pickering Lumber Co.* (Mo., 1932), 1 F. Supp. 82.

There was no conflict regarding the legal effect of the contracts and they were submitted as evidence to the Court. The contract with the H. C. Smith Oil Tool Company specifically stated that two times the regular published price

in force and effect as of August 24, 1939, was to be obtained from the proceeds of the production of oil produced from the venture [Pr. Tr. p. 109, lines 5-11], as follows:

> "1. All of the above equipment to be paid for on the basis of two times the published list price in force and effect as of August 24, 1939.
>
> 2. All payments to be made out of 10% of the first gross oil produced, the first payment starting on or before the 20th day of the month following the month of production and sale."

It is very clear that all of the payments were to be made from the venture and from the specific fund, the Oil Well Van Dusen No. 3. The relationship is that of a joint adventure.

The contract with the Rotary Drilling & Rental Corporation specifically stated the sum of one hundred dollars ($100.00), receipt of which is hereby acknowledged; five thousand dollars ($5000.00) payable out of a percentage of gross production of all oil, gas and other hydrocarbon substances saved, sold and produced from the real property hereinabove described. [Exhibit No. 1, Pr. Tr. p. 26, to p. 27, line 11.]

Also in this contract the lessor is hereby granted the option to lease said equipment for the drilling of one to two additional wells, each well in the event of the exercise of such option to be considered a rental term by itself and the consideration for the rental and the term of such rental shall be $1700.00, payable out of a percentage of the gross production of all oil, gas and other hydrocarbon substances saved, sold and produced from the real property hereinabove described, which five per cent shall be payable

in the same manner as landowner's royalty per calendar month.

The above portion of the lease agreement shows that the rental of the equipment for the second well was to be $1700.00 as a rental price from the proceeds of the production of the oil from that well. Likewise, for the third well, the cost would be $1700.00 for the use of the drilling equipment, also to be paid from the production of oil, in the same manner. These clauses show the reasonable value of the rental was $1700.00 per well, and that the first oil well was to net the respondent Rotary Drilling & Rental Corporation $5100.00, or three times the reasonable rental, to be paid out of the proceeds from the oil well. This was to give a profit from the venture of three times the value.

Thus the relationship was shown by the contracts to be that of a joint adventurer.

In re Hawkeye Oil Co. (D. C., Del., 1927), 197 Fed. (2d) 151;

Foster v. Callaghan & Co. (D. Ct., S. D., N. Y., 1918), 248 Fed. 944;

Nestor v. Joseph, In re Chicago Scrap Iron Co. (C. C. of A., 7th Cir., 1920), 265 Fed. 246;

Burgett v. Cranston et al. (C. C. A., 6th Cir., 1924), 297 Fed. 32;

Reid v. Shaffer (C. C. A., 6th Cir., 1918), 249 Fed. 553;

Keiswetter v. Rubenstein & Hammel, 235 Mich, 36, 209 N. W. 154;

Clinchfield Fuel Co. v. Henderson Iron (C. C. A. 5th, 1918), 254 Fed. 411;

In re Kessler & Co. (D. Ct., S. D., N. Y., 1909), 174 Fed. 906.

The relation of joint adventures is governed by the principles which constitute and control the law of partnerships.

15 *Ruling Case Law* 500.

This petitioner had no contract or dealings whatever with the third signer of the involuntary petition, the Service Oilfield Supply Co., Inc. [Pr. Tr. p. 51, line 30, to p. 52, line 29.] The equipment contracted for with the Rotary Drilling & Rental Corporation were all billed under the name of the Service Oilfield Supply Co., Inc., billheads, with the notations referring to the agreement "According to our lease agreement dated August 16, 1939," and "Per agreement dated August 16, 1939," and "Payable out of 5% of gross production of well per agreement August 16, 1939." [Pr. Tr. pp. 112-116.]

This shows an attempt to change the contract relationship of the Rotary Drilling and Rental Corporation to that of the Service Oilfield Supply Co., Inc. However, the testimony shows the petitioner had only one agreement with Mr. O. M. Working, who happens to be president of both corporations. [Pr. Tr. p. 5.] And that the agreement was with the Rotary Drilling & Rental Corporation. [Pr. Tr. p. 52, lines 26-29.]

Therefore, the Service Oilfield Supply Co., Inc., was not a creditor at all.

Jurisdiction of the federal courts of the United States by Acts of Congress is made to depend upon the fundamental basis of two classes of requirements. In the first class, the jurisdiction depends entirely on the character of the parties allowed to bring the action. In the second

class, the jurisdiction depends on the character of the cause, the subject matter in question.

> *Cohens v. Virginia* (1821), 6 Wheat. 264, at 378 (5 L. Ed. 257).

Jurisdiction of the subject matter does not mean simply jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which that particular case belongs. As applied to the subject matter of a suit, jurisdiction is always conferred by law, and it is incorrect to suppose that the power to decide in any case rests solely on the averments of a pleading regardless of their truth or falsity.

All jurisdiction and powers of the federal courts are derived from the Constitution and Acts of Congress.

The correctness or incorrectness of a legislative opinion on which an act is founded is not a question within the province of the courts to determine, such as judicial legislation. The courts must assume the fact to be as the Legislature states or assumes it. In this case, *creditors only* may be proper parties to an involuntary petition for bankruptcy.

The District Court, acting as a court of bankruptcy, has no power to assume jurisdiction upon an involuntary petition not brought by creditors. When a petition is made to set aside the adjudication and the evidence shows that there was a lack of proper parties, the court should have set aside the adjudication and dismissed the involuntary petition for bankruptcy.

Parties, without provable claims, or acting without good faith, cannot invoke the jurisdiction of the District Court acting as a court of bankruptcy. This proposition has been sustained as to partners:

Meek v. Centre County Bank, 268 U. S. 426, 69 L. Ed. 1028;

Robinson v. Hanaway (D. Ct., Pa.), 20 Fed. Cas. 1012, No. 11953.

As to stockholder not acting in good faith:

In re Philadelphia Rapid Transit Co. (Pa.), 8 Fed. Supp. 51, and other cases;

In re Julian (D. C., Pa., 1938), 22 Fed. Supp. 97;

In re McCloskey (D. C., Pa., 1926), 18 Fed. (2d) 311;

In re Ellis (1906), 143 Fed. 103;

Doty v. Mason (D. Ct., Fla., 1917), 244 Fed. 587;

In re Floyd & Co. (D. Ct., N. Car., 1907), 156 Fed. 206;

In re Walker (D. Ct., Ala., 1910), 176 Fed. 455;

In re Pickering Lumber Co. (D. Ct., Mo., 1932), 1 Fed. Supp. 82;

In re Hawkeye Oil Co. (D. Ct., Del., 1927), 19 Fed. (2d) 151;

In re Maples (D. Ct., Mont., 1901), 105 Fed. 919;

In re Morales (Fla., 1901), 105 Fed. 761;

In re Yates (D. Ct., Calif., 1902), 114 Fed. 365.

When jurisdiction is taken, assumed or usurped by misconstruction of statute, common law, or constitution, by weight of authority, the judgment, decree or final determination is wholly void.

Van Fleet, Collateral Attack, 1st Ed., pars. 62-224.

If the court assumes to act in a case over which the law does not give it authority, the proceeding and judgment will be altogether void, and the rights of property cannot be divested by means of them.

Spelling et al. v. Dewey et al., 122 Fed. (2d) 652.

The court said at page 656, column 2, lines 11 to 14:

> "In the proceeding for composition of indebtedness of drainage district the bankruptcy court had no greater powers than were given it by the general statute under which it was authorized to act."

Therefore, since the parties signing the involuntary petition for bankruptcy were not creditors with provable claims, and the mere conclusions alleged in the involuntary petition cannot change their status, the District Court lacked jurisdiction of the case. Lacking jurisdiction, the Circuit Court of Appeals should have vacated the adjudication and dismissed the involuntary petition for bankruptcy.

POINT II.

The Circuit Court of Appeals for the Ninth Circuit Erred in Not Declaring the Adjudication Void Because the Involuntary Petition Showed the Alleged Bankrupt to Be a Married Woman and That No Debt, Liability, or Agreement to Be Bound Was Alleged.

A debt is essential to invoke the jurisdiction of the District Court acting as a court of bankruptcy.

The jurisdiction of the District Court acting as a court of bankruptcy depends upon the character of the cause, the subject matter in question. There was no allegation of any liability to which this petitioner agreed to be bound or to pay the respondent corporations. This petitioner is a married woman and that fact showed upon the face of the involuntary petition for bankruptcy against her.

The "subject of bankruptcy," as expressed in the Constitution under which the Acts of Congress has passed the Bankruptcy Statute, is the relation of debtor and creditor. Such a relation is essential. To create such a relation a debt must be in existence between the involuntary petitioners and the alleged bankrupt. In the involuntary petition in this case, the respondent corporations did not allege that Lois G. Larson, a married woman, ever agreed to pay them anything or agreed to be bound to pay them from her separate estate.

That an allegation stating, "due, owing, and unpaid," does not say that this petitioner ever agreed to pay them. The respondent corporations have set forth conclusions of law, implications, and untruths. The two respondent corporations have not set out the joint adventure agreements. [Pr. Tr. pp. 1-5.]

In the case of *In re Farthing* (D. Ct., N. Car., 1913), 202 Fed. 557, page 562, line 17, the court said in regards to an allegation of conclusions of law:

> "The rule uniformly applied is that material facts should be distinctly, and not inferentially, alleged. The court will not supply, by intendment, an averment which the pleader has failed to make."

And at page 563, line 5, continued:

> "Is it not manifest that the respondent cannot safely and intelligently, under oath, as he must do, join issue with the petitioning creditors upon the vague, indefinite terms in which they set out the nature of their alleged claims against him? An analysis of the allegation discloses that 'they hold and own negotiable notes executed by G. C. Farthing' for the amounts named, 'now due and owing to petitioners.' No dates of alleged notes are given. It is not stated whether they hold them, or either of them, by assignment, if so from whom. No due date is given. It does not appear whether respondent executed the notes as a sole, or joint maker, or as surety, or endorser. They allege that the debts are 'provable claims.' That, however, is a conclusion of law, rather than an averment of fact, as is the allegation that they are negotiable notes, and this is always bad pleading. . . ."

(Page 563, line 23):

> "* * * of all of which he is entitled to be apprised and the court to be informed. Would any court, proceeding in accordance with any recognized system of procedural law, entertain an allegation so vague and indefinite as a basis for the finding the existence of the essential jurisdictional fact without which it could not proceed to render judgment at law or decree in equity?"

The court must be informed of the facts upon which its jurisdiction depends and not by inferences.

It was not this petitioner, Lois G. Larson, that used the equipment and bits. It was the contractor who drilled the oil well. It was not contemplated by the joint adventure contract that she would personally guarantee the payments of two or three times the regular price for the equipment used by the contractor. These joint adventure contracts specifically stated that the payments were to be made from the proceeds of production of oil from an oil well to be drilled upon the lease owned by this petitioner.

The involuntary petition for bankruptcy shows that this petitioner was a married woman. The complaint must allege that the married woman intended to or did charge, or agreed to charge the indebtedness against her separate estate.

30 *Corpus Juris,* note 7, p. 880.

An involuntary petition for bankruptcy must show the agreement and this agreement must show whereby she intended to agree to be bound in regards to herself, personally.

In re Howland, Fed. Case No. 6791 (N. Y., 1868), 12 Fed. Cases 727.

No intention to be bound or agreement to be bound can be implied against a married woman because there was no power to contract before the passing of the married woman statute.

In the case of *In re Howland,* Fed. Case No. 6791, an involuntary petition was filed based upon a note that she had signed. The contention was that according to the married woman's statute, she might be sued on her contracts "as if unmarried." But the court said otherwise at page 728, line 19:

> "There was no intention expressed in the note, which is the foundation of the petition, to bind Mrs. Howland's separate estate, and there being no allegation that it was for the benefit of her separate estate, or in the course of her trading transaction, the petition must be dismissed."

The *California statute, Civil Code,* section 158, is like the New York statute which grants to the married woman the right to contract "as if unmarried." But neither statute grants to third parties the right to an implied agreement to be bound against her, or implied intention to be bound.

There was no such allegation in the involuntary petition for bankruptcy in the instant case. [Pr. Tr. pp. 1-6.] It shows upon its face that a debt is lacking. Thus the lack of jurisdiction shows upon the face of the involuntary petition for bankruptcy.

> *Vallely v. Northern Fire & Marine etc.* (1920), 254 U. S. 348, 65 L. Ed. 297.

Facts essential to give the federal court jurisdiction must be positively alleged and not left to inferences.

> *Lawndale et al. v. Gray's Harbor Boom Co.* (D. Ct., W. D., Wash., 1902), 117 Fed. 983.

In the case of *Manhattan Properties v. Irving Trust Co.* (1934), 291 U. S. 320, 78 L. Ed. 825, the court said:

> "There can be no debt provable in bankruptcy arising out of a contract which becomes effective only at the claimant's option and after the inception of the proceedings the fulfilment of which is contingent on what may happen from month to month or up to the end of the original term."

A judgment against a married woman is void where the record does not disclose the fact that she has a separate estate and that it is liable for her debts. The judgment was set aside.

> *Canal Bank of New Orleans v. Partee*, 99 U. S. 325, 25 L. Ed. 390.

Therefore, since the involuntary petition for bankruptcy did not show on its face that the alleged bankrupt, a married woman, contracted to be bound as to her separate property, and because no actual debt existed between the respondent involuntary petitioners and the alleged bankrupt, the District Court lacked jurisdiction. Thus the Circuit Court of Appeals for the Ninth Circuit should have vacated the adjudication and dismissed the involuntary petition for bankruptcy.

POINT III.

The Circuit Court of Appeals for the Ninth Circuit Erred in Deciding That the Truth or Falsity of the Allegations of an Involuntary Petition for Bankruptcy Could Not Be Inquired Into, and Erred in Not Vacating the Adjudication and Dismissing the Involuntary Petition for the Extrinsic Fraud Upon the Court.

A false allegation of a jurisdictional fact made for the purpose of inducing the court to assume jurisdiction is an extrinsic fraud upon the court.

It is clearly shown by the cases cited and the statements of the court in each case, just what extrinsic fraud is. In this case the respondent corporations alleged in the involuntary petition for bankruptcy that they were creditors of this petitioner, having provable claims. This petitioner placed the true facts before the court in her petition to vacate the adjudication and placed in evidence at the hearing, the joint adventure contracts and brought the true facts out that the Service Oilfield Supply Co., Inc. never had any dealings with this petitioner. These facts were uncontradicted. The court refused to consider that the false allegations of the respondent corporations was against all equity principles and justice, and refused to decide the same an extrinsic fraud upon the court. It was clearly shown that the allegations were made only for the purpose of inducing the Bankruptcy Court to assume jurisdiction over the property of this petitioner.

The weight of authority is that when a petitioner alleges a jurisdictional requirement:

> "Knowing that an allegation was false, or did so recklessly not caring whether the allegation which it affirmed as of its own knowledge to be true, was

true or false, and being false its conduct was a fraudulent attempt to confer jurisdiction upon the court, where none existed."

Navison Shoe Co. v. Lane etc. (1929), 36 Fed. (2d) 454 (C. C. A. 1st Cir.)

In re Ettinger (C. C. A. 2nd Cir., 1935), 76 F. (2d) 741.

The court said in the case of *Bank of Arapahoe v. Bradley & Company*, 72 Fed. 867 (C. C. A. 8th Cir.):

"In determining only whether a claim is made in good faith or is fictitious and made only for the purpose of imposing upon the court a case not within its jurisdiction, plaintiff will be held to a knowledge of well settled rules of law and when the actual matter in controversy is inadequate in value to confer jurisdiction and the additional amount required for that purpose is attempted to be supplied by setting up a claim easily susceptible to proof, if made in good faith, but in support of which no proof is offered and no satisfactory explanation given or adding a claim for which the law gives no right of action, and which there can be no recovery, such a claim must be held to be fictitious and to have been made for the purpose of perpetrating a fraud upon the jurisdiction of the court."

In the case of *Carey v. Carey*, 183 Atl. 371, 121 Penn. Sup. 251, at page 373, the court ruled that a false allegation of libel for divorce as to residence within the state, occupation of libelant, the wife's desertion of libelant, and the concealment of pending suit from the defendant, was an extrinsic fraud on the court, which court had power to rectify by setting aside of the judgment fraudulent obtained thereby.

In the case of the *State of Oregon v. Vincent,* 152 Ore. 205, 52 Pac. (2d) 203, where a petition for appointment of one of the petitioners as administratrix stated that "petitioners and a third person were the sole heirs" and the administratrix' final account and order of distribution contained a similar statement. The concealment of the fact that such petitioners and third person bore no relationship to the deceased was held to be extrinsic fraud and hence the order of distribution was properly set aside in a suit by the state. The court said on page 205 of Pacific Report, column 1:

> "It seems to be generally held that the concealment of facts, which would have caused the judgment or decree not to have been rendered will constitute extrinsic fraud sufficient to authorize the court upon the discovery of the fraud, or when such fraud is called to the attention of the court, to vacate such judgment or decree."

In the case of *Paul v. Paul,* 41 S. D. 383, 170 N. W. 658, at page 660, of the Northwestern Reporter, column 2, lines 4-5, the court said:

> "The filing of a fraudulent petition for administration is extrinsic fraud."

and at lines 39-43 of the same page, continued:

> "Where a judgment or decree has been procured through and is the result of extrinsic fraud practiced upon the court, such judgment or decree may, thereafter, at any time, be vacated and set aside as wholly void."

"Good Faith" means a real creditors' petition, not merely a petition signed by three persons who have the technical status of creditors.

As to "Good Faith" in the petition to the court praying that the Bank ruptcy Court take jurisdiction, see the case of *Mandate Sugar Co. v. Mock,* 75 F. (2d) 284.

In re Philadelphia Rapid Transit Co. (Pa.), 8 F. Supp. 51;

In re Scammon, Fed. Cas. 12427, 21 F. Cas. 617.

A judgment *in rem* is wholly void if an essential jurisdictional fact does not exist.

Scott v. McNeal, 154 U. S. 34, 14 S. Ct. 1108.

In the case of *Robinson v. Anderson,* 121 U. S. 522, 30 L. Ed. 1021, the court held, that the Circuit Court cannot be required to keep jurisdiction of the suit simply because the complaint makes a case arising under the laws of United States, if from the entire pleading it appears that the averment making such a case are immaterial and especially if they were evidently made for the purpose of creating a case, cognizable by said court, where none in fact existed.

In the case of *Kerr v. Southwest Fluorite Co.,* 294 Pac. 324, it was held that a judgment obtained against a corporation by default in an action wherein four of five directors had an adverse interest constituted extrinsic fraud or collusion warranting vacation of the judgment at the instance of stockholders whose director's interest had not been disclosed.

The results of the proceedings by the joint adventurers were that they controlled the appointment of a trustee

of their own choosing and their attorney became attorney for the trustee in bankruptcy all as matters of course. In the case of *Associated Oil Co.* (1921), 271 Fed. 788 (D. Ct. La.), the adjudication was set aside when the court discovered that the officers of the petitioning corporation for bankruptcy were the same as the officers of the alleged bankrupt. The court said at page 790, lines 4-9:

> "In that event the custody and control of the assets of the oil company would in effect be restored to the very men from whom the state saw fit to take them. This would enable officers of the oil company to perpetrate a fraud on the state court through the agency of the Bankruptcy Court, something unthinkable."

The respondent corporations falsely alleged that they were creditors with provable claims. They knew of the joint adventure contracts in which they were to receive their share from the venture in double and treble amounts for their contribution. When this petitioner brought the full and true facts to the attention of the court they maintain that the adjudication is *res judicata*. Yet, the law is definite, that fraud upon the court can always be looked into. The rule that an equity court will set aside an adjudication made by it, when it is informed of the extrinsic fraud is well settled and based upon sound principles of justice. The adjudication in this case should be vacated and the involuntary petition in bankruptcy dismissed.

POINT IV.

The Circuit Court of Appeals for the Ninth Circuit Erred in Deciding That There Was No Lack of Jurisdiction of the District Court Even Though This Petitioner Was Never Served With a Copy of the Involuntary Petition for Bankruptcy and Subpoena, and in Not Deciding That the Duress, Pressure and Threats or Requests to Obtain a Consent to an Adjudication by the Attorney for the Respondents, Constituted Extrinsic Fraud.

(a) Statutory Requirement of Service of Process.

Service of petition for involuntary bankruptcy with a writ of subpoena to acquire jurisdiction is essential.

The Bankruptcy Act specifically states a mandatory requirement that the petition for involuntary bankruptcy with a writ of subpoena be served upon the person therein named as a defendant. *Bankruptcy Act,* Art. IV, Section 18 a and c (U. S. C. A., Title 11, Chap. 4, Sec. 41), states as follows:

> "a. Upon the filing of a petition for involuntary bankruptcy service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant.
>
> "c. All pleadings setting up matters of fact shall be verified under oath."

This petitioner, a married woman, was never served with a copy of the petition for involuntary bankruptcy nor was she served with a subpoena. But instead the attorney for the respondent corporations obtained a consent before the filing of the involuntary petition for bankruptcy. This petitioner, a married woman, did not sign

the consent before any notary public. [Pr. Tr. p. 56, lines 25-27.] The notary public signature was later supplied in Mr. Dechter's office by an associate attorney of his.

Where a married woman acknowledges an instrument conveying her property other than before an officer designated by statute to take acknowledgment, her acknowlment is of no effect.

1 *Corpus Juris Secundum*, p. 821, par. 51.

In the case of *In re Tacoma Auto Freight Company* (1925), 5 Fed. (2d) 752 (D. Ct. Wash.), the court said in regard to the issuance and service of a subpoena as required by the Bankruptcy Act, Section 18 (a) and (c), as being essential to give the court jurisdiction over an alleged bankrupt (Column 2, lines 21-22):

> "A subpoena in chancery brings the party into court."

(Column 2, lines 40-42):

> "The order to show cause contains some essentials of a subpoena. It does not show, however, that it is a command of the United States."

(Column 2, lines 53-55):

> "The voluntary appearance of the bankrupt and default for answer did not obviate the necessity of subpoena."

The essential requirements of the service of petition for an involuntary bankruptcy and subpoena is lacking in this case. It cannot be supplied in any other way than the mandatory requirements of the statute. The mode of procedure supplied by the attorney for the respondent

corporations cannot supersede the statutory requirement. Thus the adjudication should be set aside for lack of jurisdiction over this petitioner.

(b) EXTRINSIC FRAUD ON PETITIONER.

Any method not provided by law which is used by the plaintiff, to prevent the defendant from presenting his valid and sufficient defense to the suit, constitutes extrinsic fraud.

There is no degrees of fraud. And "duress" is a species of fraud in which compulsion in some form takes the place of deception in accomplishing the injury.

Cooley on Torts, Vol. 2, 4th Ed., p. 623.

Whether such external pressure or influence is sufficient to destroy the free agency of a party is a question to be determined by the age, sex, intelligence, experience, and force of will of the party, the nature of the act, and of all the attendant facts, and circumstances.

Pride v. Baker (Tenn.), 64 S. W. 329;

10 *Amer. & Eng. Enc. Law* (2d) p. 321.

And there may be duress although the person accused is not guilty.

International Harvester Co. v. Voboril (C. C. A. 8th Cir.), 187 Fed. 973.

It (the threat) may be made by innuendo or suggestion.

62 *Corpus Juris* 933, Note 24.

The "term" threat is very broad and indefinite, including almost any kind of an expression of intention of one person to do an act against another.

62 *Corpus Juris* 932, Notes 1 and 2.

33 *Corpus Juris* 479, Notes 4, 5, and 6.

Mr. Raphael Dechter, attorney for the respondent corporations, prepared an involuntary petition for bankruptcy against this petitioner on or about the 20th day of March, 1940. This was several weeks before the filing thereof. He, himself, notarized the signature of R. F. Plane, acting for the H. C. Smith Oil Tool Company on March 20th, 1940, as shown by the original petition on file in this case. He also prepared the consent to the adjudication which is shown as prepared upon his stationery. He prepared the creditors' agreement. On the same day that he held the meeting in his office, April 1, 1940, he notarized the signature of O. M. Working as president of the Rotary Drilling and Rental Corporation and president of the Service Oilfield Supply Co., Incorporated, as signers to the involuntary petition for bankruptcy against this petitioner. Mr. Dechter knew of the joint adventure contracts of his clients on April 1, 1940. Mr. Dechter is presumed to know the requirements for an involuntary proceedings in bankruptcy and practices quite extensively before that court.

Mr. Dechter's own words are [Pr. Tr. p. 70, lines 9-19]:

> "I stated that it was my opinion that any agreement providing for the payment of or proceeds of oil out of a certain percentage of the proceeds, even though it might be conditional and continuing only

until the date so paid was nevertheless a security, and being a security and they having admitted no permit had been secured from the corporation commissioner it was my opinion that the assignment or agreement that these creditors had received was just a mere scrap of paper * * *"

And at page 71 of Petitioner's Transcript lines 16-19, he further stated:

"And I told them I had no doubt I would be able to prevail in the suit I had filed previous to this meeting for the various creditors."

And in answer to questions he stated as follows [Pr. Tr. p. 87, line 22, to p. 88, line 2]:

"Q. (By Mr. Cooper.) During the conversation as of April 1st or on or about that date, the conversation you referred to, there was some mention of the Corporate Securities Act. A. Yes. (By Mr. Dechter).

Q. You said in your opinion it was necessary and Mr. Larson said he didn't think it was necessary? A. Mr. Larson seemed to act as if he was an attorney himself and I said it was my opinion it was necessary."

There is no other conclusion that Mr. Dechter knew that he would have to secure by whatever means possible the signature of Mrs. Larson, before he filed this particular involuntary petition for bankruptcy against her. It is admitted by Mr. Dechter, attorney for the respondent corporations, that there was a discussion concerning the violation of the Corporate Securities Act. He stated that it was necessary, to discuss the Corporate Securities Act. Mr. Larson stated that such discussion was not necessary.

The testimony of Mr. Dechter on page 94 of Petitioner's transcript, line 13, further shows:

> Q. (By Mr. Cooper.) At the time you gave Mr. Larson this consent I believe it was stated,—I think you stated you gave the consent to Mr. Larson to bring to his wife? A. As to what? (By Mr. Dechter.)
>
> Q. Was any statement made as to its being signed— A. I simply gave it to him to be signed.
>
> Q. Was there anything said in the statement about it should be signed? A. No. I told Mr. Larson in order to get a receiver appointed without delay we would need the consent to adjudication; that otherwise the court might require an order to show cause or a hearing.
>
> Q. Are those the exact words you used? A. And in order to expedite the matter he should get a consent signed by Mrs. Larson, and my recollection is I gave him that at the same time I gave him the letter authorizing the termination of the agreement and authorizing the committee to surrender what funds they had to the Receiver in possession. At the time that letter was prepared there was no Receiver as yet, there was no bankruptcy proceedings filed yet.

It is very evident that Mr. Dechter demanded a consent to an adjudication before there was ever any involuntary petition for bankruptcy filed. There can be no other conclusion that Mr. Dechter did not desire to have the allegations of the involuntary petition controverted by an answer, and the true facts to become known to the court.

The evidence shows that this petitioner signed the consent on the afternoon of April 8th about 3 p. m. [Pr.

Tr. p. 45, lines 27-31] and that Mr. Dechter acting as attorney for the respondent corporations filed the involuntary petition for bankruptcy at 3 p. m. April 8, 1940. [Corrected Pr. Tr. p. 6.]

This petitioner had before her the agreement for the benefit of creditors, the involuntary petition for bankruptcy, the consent to an adjudication, and all this talk about violations of the Corporate Securities Act. The testimony of this petitioner is as follows [Pr. Tr. p. 66, line 26, to p. 67, line 5]:

> "He said that in this Shafer Oil Tool hearing, I stated that I had put aside some seventy per cent reserve to pay these creditors out of the oil proceeds and that in his opinion this was a violation of the Corporate Securities Act and that I could and would be sued under this Corporate Securities Act if I didn't sign this petition, or this creditors' agreement."

And at page 55, lines 28 to 29 of petitioner's transcript. Mrs. Larson testified:

> "As I understand it a sentence in jail is one of the violations of the Corporate Securities Act."

And at page 57, lines 26-27, Mrs. Larson stated:

> "The fact was at the time I was physically unable to fight a lawsuit."

And at page 48, lines 27-28, she stated:

> "Well, that if I had not been so nervous about a lawsuit at the time, I would have demanded to see the petition before signing, but he really didn't give me time."

The testimony of Mr. C. A. Denn was as follows [Pr. Tr. p. 63, lines 6-7]:

> "I never heard anyone speak so rough * * * Well, Mr. Dechter said that if she didn't sign that she would be, in my wording, prosecuted."

Mr. John L. Parker testified, in answer to the question if there would be any criminal prosecution of any kind [Pr. Tr. p. 65, line 27]:

> "Not if the paper was signed."

The testimony of G. A. Larson [Pr. Tr. p. 67, lines 26-27] in regards to the words of Mr. Dechter were:

> "Well, you can sign now or else I will take steps to prosecute."

Also at page 67, lines 18-22 Mr. Larson testified regarding the statements of Mr. Dechter:

> "The debtor has no chance in defending under the Corporate Securities Act * * * and that if she went along and *signed* the papers he (Mr. Dechter) had prepared there would not be anything done about it."

It matters not what type of action is to be taken under the Corporate Securities Act. The frightening part of it all is that the violation of said act carries a fine, or imprisonment, or both fine and imprisonment. The innuendo and suggestion was by the attorney for the respondent corporations herein to decide which was the better course. Because the consent was in fact obtained, it mattered not whether there was any actual steps taken towards causing a prosecution under the Corporate Securities Act. A violation of the Corporate Securities Act

is punishable by fine and imprisonment. Act 3814 of General Laws of California, Sections 17 and 18:

> "Section 17. Sales in violation of act, a public offense.
>
> Every company which shall directly or indirectly offer for sale, or negotiate for the sale of or sell, or issue, or cause to be issued, any security contrary to the provisions of this act, . . . shall be guilty of a public offense and shall be punishable by a fine not exceeding ten thousand dollars.
>
> Section 18. Violation of act by officers, etc.
>
> Every officer, agent, employee of any company and every other person, . . . is guilty of a public offense and shall be punished by imprisonment in the state prison not exceeding five years, or in a county jail not exceeding two years, or by a fine not exceeding five thousand dollars, or by both such fine and imprisonment."

It is plain that the right to prosecute a defense to an involuntary petition for bankruptcy in which all of the alleged debtor's *property is being taken away,* is a property right. And that a threat made for the purpose of inducing the defendant to refrain from defending or answering the petition in bankruptcy, or controverting as untrue the allegations in the involuntary petition, is a threat made with intent to extort property from another.

In the case of *People v. Cadman,* 57 Cal. 562, it was decided that

> "the right to take and prosecute an appeal is property within the meaning of Penal Code 519; and a threat made for the purpose of inducing an appellant to dis-

> miss an appeal is a threat made with intent to extort property from another."

The threat in the *Cadman* case was as follows:

> "Having recently received * * * affidavits * * * which would be ruinous to your character and testimony, either in a court of justice or in your business relations with others, we give you this opportunity of withdrawing your appeal."

In the case of *People v. Wrightman,* 104 N. Y. 598, 11 N. E. 155, there was a threat by innuendo and suggestion as follows:

> "I suppose you are aware that under these conditions you are liable for the support of the child, and the mother's expenses during her sickness. Are you willing to make suitable provision for such liability and thereby avoid publicity, or will it be necessary to take legal steps in the matter? . . ."

The withholding of information as to the contents of an involuntary petition for bankruptcy while demanding a consent to an adjudication, is one of the characteristics of duress. The fact that the consent was signed on the stationery of the person demanding the consent indicates that it was not signed voluntarily.

It was stated in the case of *Union Pacific R. R. Co. v. Pub. Ser. Com.,* 248 U. S. 67, 39 S. Ct. 24, 63 L. Ed. 131, at page 133 of L. Ed., column 1, line 34:

> "It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is characteristic of duress properly so called."

In the case of *Carter v. Carter Coal Co.* (1935), 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160, at page 1177, L. Ed., column 2, line 1, the court said:

> "One who does a thing in order to avoid a monetary penalty does not agree; he yields to compulsion precisely the same as though he did so to avoid a term in jail."

The respondents have no right to claim the benefits of a formal consent to an adjudication and strengthen their position so that they may stand and assert that their allegations in the involuntary petition for bankruptcy be not questioned. It is against all justice and equity that the claims should ripen into that of *bona fide* creditors by the advantages they have gained by the absence of any defense that would have questioned their rights to an adjudication. There was signed a signature without real consent which is necessary to a formal contract and this without the knowledge of the facts in the involuntary petition for bankruptcy.

The Circuit Court of Appeals for the Ninth Circuit erred in deciding there was no lack of jurisdiction when there was no service of the involuntary petition for bankruptcy against her, nor subpoena, and the court erred in not deciding that the facts of duress, pressure, threats and demands upon this petitioner did not constitute extrinsic fraud, when considering the sex, the position of this petitioner, the position of the agents of the respondent corporations, the force used, the nature of the discussions of the Corporate Securities Act, and of all the attendant facts and circumstances.

Conclusion.

Petitioner respectfully submits the decisions of the Circuit Court of Appeals for the Ninth Circuit holding this petitioner a bankrupt upon an involuntary petition for bankruptcy, signed by parties who were not creditors with provable claims, is an erroneous decision of an important question of federal bankruptcy law which has not been but should be settled by this Honorable Court; that the decision of the Circuit Court of Appeals for the Ninth Circuit is an important question of general law, untenable and in conflict with the weight of authority and that the Circuit Court of Appeals for the Ninth Circuit has sanctioned a departure from the accepted and usual course of judicial proceeding by the lower court, the District Court, Southern District of California, Central Division, as to call for an exercise of this Court's power of supervision. And it is respectfully urged that this petition be granted in order that this Honorable Court may pass upon the important questions and reverse the decision of the Circuit Court of Appeals for the Ninth Circuit thereby relieving this petitioner of a grievous injustice.

Dated this 19th day of December, 1941.

Respectfully submitted,

LOIS G. LARSON,

In Propria Persona.